Strict Products Liability: Giving Content to the Term "Defect" in Design Cases

Courts have long wrestled with the meaning of the term "defect" in strict products liability actions, especially those in which the design of the product is allegedly defective. New Jersey Supreme Court Justice Francis once stated with respect to the meaning of defect: "Suffice it to say the concept is a broad one. The range of its operation must be developed as the problems arise and by courts mindful that the public interest demands consumer protection."[1] The California Supreme Court in *Barker v. Lull Engineering Co.*[2] set forth two standards for determining whether a product that causes injury is defectively designed. First, the court held that a product may be found defective in design if it fails to perform as safely as an ordinary consumer would expect.[3] Second, the court held that a product may be found defective in design if the risk of danger inherent in the challenged design outweighs the benefits of the design.[4] This Case Comment will examine the doctrine of strict products liability in California and analyze the *Barker* standards for design defects. The analysis will focus on *Barker*'s relationship to California's strict products liability theory and policy, and will conclude that the decision is generally consistent with California precedent.

I. The Origins of Strict Products Liability

A. *Theoretical Foundations*

The origins of strict products liability in California may be traced to the 1944 case of *Escola v. Coca Cola Bottling Co.*[5] Concurring in that decision, California Supreme Court Justice Traynor urged the court to do away with negligence and the fictions of warranty theory, both characteristic of existing products liability decisions.[6] He suggested that the court instead adopt a theory of absolute liability.[7] It was not until 1963 that Justice Traynor, writing for a unanimous court, pronounced the rule of strict products liability in *Greenman v. Yuba Power Products, Inc.*:[8] "A

1. Santor v. A and M Karagheusian, Inc., 44 N.J. 52, 67, 207 A.2d 305, 313 (1965).

2. 20 Cal. 3d 413, 573 P.2d 443, 143 Cal. Rptr. 225 (1978). *See also* Cepeda v. Cumberland Eng'r Co., 76 N.J. 152, 386 A.2d 816 (1978). For a discussion of the doctrine in Ohio, see Note, *The Coming of Age of Strict Products Liability in Ohio*, 39 Ohio St. L.J. 586 (1978).

3. 20 Cal. 3d at 429, 573 P.2d at 454, 143 Cal. Rptr. at 236; *see* text accompanying notes 62-64 *infra*.

4. *Id.* at 430, 573 P.2d at 454, 143 Cal. Rptr. at 236; *see* text accompanying notes 65-67 *infra*.

5. 24 Cal. 2d 453, 462, 150 P.2d 436, 440 (1944) (Traynor, J., concurring).

6. *Id.* at 461, 150 P.2d at 440.

7. *Id.*

8. 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963).

manufacturer is strictly liable in tort when an article he places on the market, knowing that it is to be used without inspection for defects, proves to have a defect that causes injury to a human being."[9] This oft-quoted phrase is sometimes referred to as the *Greenman* rule.

In 1965, section 402A of the Restatement (Second) of Torts was published in its final form. This section states in part: "One who sells any product in a defective condition unreasonably dangerous . . . is subject to liability for physical harm thereby caused . . . ."[10] Strict products liability is not the absolute liability urged by Justice Traynor in *Escola*. The requirement of a defect, imposed by both the *Greenman* rule and the Restatement, distinguishes strict products liability from absolute liability. Under the theory of absolute liability, a manufacturer or seller would be subject to liability whenever an injury was caused by a product, irrespective of the presence of a defect. The defectiveness requirement in strict products liability limits liability so that a manufacturer or seller does not become an unlimited insurer of the product.[11]

Although initially the *Greenman* rule and the Restatement were often thought to be interchangeable,[12] a subsequent California decision drew a significant distinction between the two. In *Cronin v. J.B.E. Olson Corp.*, the California Supreme Court held that the plaintiff does not have to prove that the product is "unreasonably dangerous" in order to recover in strict products liability.[13] This language had been employed in several California decisions[14] and is part of Restatement section 402A.[15] The first reason given by the *Cronin* court for not requiring proof that the product is

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9. *Id.* at 62, 377 P.2d at 900, 27 Cal. Rptr. at 700.

10. RESTATEMENT (SECOND) OF TORTS § 402A (1965) reads in full:

(1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if

(a) the seller is engaged in the business of selling such a product, and

(b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.

(2) The rule stated in Subsection (1) applies although

(a) the seller has exercised all possible care in the preparation and sale of his product, and

(b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

Comment g states that a product is in a defective condition if it is "at the time it leaves the seller's hands, in a condition not contemplated by the ultimate consumer, which will be unreasonably dangerous to him." Comment i states that in order to be unreasonably dangerous, the product "must be dangerous to an extent beyond that which would be contemplated by the ordinary consumer . . . ."

11. *See* Barker v. Lull Eng'r Co., 20 Cal. 3d 413, 432, 573 P.2d 443, 456-57, 143 Cal. Rptr. 225, 238-39 (1978).

12. *See, e.g.*, Jiminez v. Sears, Roebuck & Co., 4 Cal. 3d 379, 384, 482 P.2d 681, 684, 93 Cal. Rptr. 769, 772 (1971); Pike v. Frank C. Hough Co., 2 Cal. 3d 465, 475, 467 P.2d 229, 236, 85 Cal. Rptr. 629, 636 (1970).

13. 8 Cal. 3d 121, 123, 501 P.2d 1153, 1155, 104 Cal. Rptr. 433, 435 (1972).

14. *E.g.*, Jiminez v. Sears, Roebuck & Co., 4 Cal. 3d 379, 384, 482 P.2d 681, 684, 93 Cal. Rptr. 769, 772 (1971); Pike v. Frank C. Hough Co., 2 Cal. 3d 465, 475, 467 P.2d 229, 236, 85 Cal. Rptr. 629, 636 (1970).

15. Text set forth at note 10 *supra*.

unreasonably dangerous was that the term "rings of negligence."[16] One of the purposes of the strict products liability action is to avoid burdening the plaintiff with the necessity of proving negligence.[17] Second, the court objected to a requirement that burdened the plaintiff with proving that the product was *both* defective *and* unreasonably dangerous.[18] The court did not, however, disapprove of the primary purpose for which the language was included in the Restatement formulation: to assure that normally harmless but potentially dangerous products—for example, sugar, butter, and liquor—do not give rise to strict products liability.[19]

B. *Policy Foundations*

The foremost policy underlying the doctrine of strict products liability in California was stated by Justice Traynor in *Greenman*: "The purpose of such liability is to insure that the costs of injuries resulting from defective products are borne by the manufacturers that put such products on the market rather than by injured persons who are powerless to protect themselves."[20] The court in *Jiminez v. Sears, Roebuck & Co.* noted: "[I]t has been suggested that liability might be imposed as to products whose norm is danger."[21] Extending this rationale of risk allocation, liability could conceivably be expanded to include harm resulting from inherently dangerous characteristics of good products, such as injuries caused by a polio vaccine or by the Pasteur rabies treatment.[22]

Another reason for adopting strict products liability is to relieve an injured person of the burden of proving negligence.[23] Easing the plaintiff's burden of proof is essentially a means of achieving the broader policy of risk allocation. A person will be subject to liability for negligence if he fails to exercise reasonable care to avoid foreseeable risk of harm.[24] To prove that the defendant's conduct was unreasonable, the plaintiff must show the possibility and gravity of harm outweighed the usefulness of the product, and that a reasonable man in the position of the defendant knew or should

16. 8 Cal. 3d at 132, 501 P.2d at 1162, 104 Cal. Rptr. at 442.

17. *Id.* at 133, 501 P.2d at 1162, 104 Cal. Rptr. at 442. *See generally* text accompanying notes 23-26 *infra*.

18. 8 Cal. 3d at 133, 501 P.2d at 1162, 104 Cal. Rptr. at 442.

19. *See* RESTATEMENT (SECOND) OF TORTS § 402A, Comment i (1965); *The Supreme Court of California: 1971-1972*, 61 CALIF. L. REV. 656, 659 (1973).

20. Greenman v. Yuba Power Prods., Inc., 59 Cal. 2d 57, 63, 377 P.2d 897, 901, 27 Cal. Rptr. 697, 701 (1963). Nearly two decades earlier, in calling for absolute liability, Justice Traynor had said: "The cost of an injury and the loss of time or health may be an overwhelming misfortune to the person injured, and a needless one, for the risk of injury can be insured by the manufacturer and distributed among the public as a cost of doing business." Escola v. Coca Cola Bottling Co., 24 Cal. 2d 453, 462, 150 P.2d 436, 441 (1944) (Traynor, J., concurring).

21. 4 Cal. 3d 379, 383, 482 P.2d 681, 684, 93 Cal. Rptr. 769, 772 (1971) (citing Traynor, *The Ways and Means of Defective Products and Strict Liability*, 32 TENN. L. REV. 363, 367-69 (1965)).

22. Keeton, *Product Liability and the Meaning of Defect*, 5 ST. MARY'S L.J. 30, 33 (1973).

23. Cronin v. J.B.E. Olson Corp., 8 Cal. 3d 121, 133, 501 P.2d 1153, 1162, 104 Cal. Rptr. 433, 442 (1972).

24. W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 30, at 143 (4th ed. 1971).

have known of the risk of harm when the product was sold.[25] In a suit based on negligence, the plaintiff may have difficulty proving that: (1) a particular defendant was responsible for creating the risk of harm; or (2) the risk of harm could have been discovered by proper inspection; or (3) a specific act or omission caused the risk of harm.[26] Allowing recovery in strict products liability eases the injured person's burden of proof by focusing on the product defect and not the defendant's conduct.

A further policy underpinning strict products liability is the potential reduction of harm caused by defective products.[27] It may be argued that since the manufacturer's potential liability is greater in strict products liability than it is in negligence, the manufacturer will produce a product that is safer for the consumer.[28] Some commentators, however, have expressed doubt whether strict products liability actually induces greater care than does liability for negligence.[29] Even if it does incite greater concern for safety, it may also tend to inhibit the development of new products, such as beneficial drugs.[30]

The final policy suggested by Justice Traynor in *Escola* is the avoidance of circuitous litigation. In an action for breach of a sales warranty, the retailer is subject to liability to the purchaser without regard to fault. Indemnity can be recovered along the chain of supply so that the manufacturer eventually pays the costs for the injury. Allowing the injured purchaser to recover directly from the manufacturer in strict products liability avoids burdening the parties and the courts with numerous suits.[31]

Although a variety of policy goals may justify the imposition of strict products liability in a given case, the courts in California have consistently emphasized the goal of risk allocation. One way the courts have tried to achieve this goal is by easing the plaintiff's burden of proof. Risk allocation is an attempt to ensure that the party best able to absorb the loss will be held liable. The imposition of strict products liability may also have an incidental effect of improving product safety.

C. *The Defect Requirement*

There are at least three general classifications of product defects.

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25. Keeton, *Products Liability—Some Observations About Allocation of Risks*, 64 MICH. L. REV. 1329, 1336 (1966).

26. Note, *Abnormal Use in the Strict Products Liability Case—The Plaintiff's Burden of Proof?*, 6 SW. L. REV. 661, 668-69 (1974).

27. In *Escola*, Justice Traynor suggested this rationale: "It is to the public interest to discourage the marketing of products having defects that are a menace to the public." Escola v. Coca Cola Bottling Co., 24 Cal. 2d 453, 462, 150 P.2d 436, 441 (1944) (Traynor, J., concurring).

28. Hoenig, *Product Design and Strict Tort Liability: Is There a Better Approach?*, 8 SW. L. REV. 109, 131 (1976).

29. Keeton, *supra* note 22, at 34; Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 YALE L.J. 1099, 1119 (1960).

30. Keeton, *supra* note 22, at 34.

31. Escola v. Coca Cola Bottling Co., 24 Cal. 2d 453, 464, 150 P.2d 436, 442 (1944) (Traynor, J., concurring); Prosser, *supra* note 29, at 1123-24.

First, a product may contain a "manufacturing defect" when it differs from the intended result of the manufacturer or seller at the time of sale.[32] A typical example would be a machine that fails to comply with the manufacturer's own specifications.[33] These cases generally concern an isolated error in the manufacture or inspection of the product.

A defect can also arise when a manufacturer or seller gives inadequate warning or instructions about either the risk involved in the use of the product or how to minimize the harmful consequences from such risks.[34] These cases are generally discussed under the rubric of "failure to warn," though at least one commentator has suggested that they are properly classified as design defects.[35] Typically these cases concern beneficial drugs, although an early California decision dealt with inadequate warning about the safe use of dynamite.[36]

Finally, a product may be found to have a "design defect" if the design of the product causes injury to a human being.[37] Automobiles are perhaps the subject of the best known cases dealing with design defects.[38] Since the entire product line is being challenged in a design defect case, the potential economic consequences of an unfavorable decision to the manufacturer are generally much greater than in a suit based on an isolated manufacturing defect.

The question naturally arises how courts are to decide when a product is defective. Dean Wade, in an article frequently cited as authority in *Barker*, has suggested that manufacturing defect cases be treated under principles of strict products liability and that design defect or inadequate warning cases be resolved under "negligence techniques."[39] Another commentator has also urged that Restatement section 402A be limited to cases concerning defects in the manufacturing process.[40] Dean Keeton has suggested that in design defect cases, courts should decide "whether or not negligence is or is not a prerequisite to recovery."[41] In order to understand

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32. Barker v. Lull Eng'r Co., 20 Cal. 3d 413, 429, 573 P.2d 443, 454, 143 Cal. Rptr. 225, 236 (1978); Keeton, *supra* note 22, at 33.

33. *See, e.g.*, Lewis v. American Hoist & Derrick Co., 20 Cal. App. 3d 570, 97 Cal. Rptr. 798 (1971).

34. Keeton, *supra* note 22, at 34.

35. Twerski, *From Defect to Cause to Comparative Fault—Rethinking Some Product Liability Concepts*, 60 MARQ. L. REV. 297, 303 (1977).

36. Canifax v. Hercules Powder Co., 237 Cal. App. 2d 44, 46 Cal. Rptr. 552 (1965).

37. Greenman v. Yuba Power Prods., Inc., 59 Cal. 2d 57, 62, 377 P.2d 897, 900, 27 Cal. Rptr. 697, 700 (1963); Keeton, *supra* note 22, at 33-34.

38. *See, e.g.*, Heap v. General Motors Corp., 66 Cal. App. 3d 824, 136 Cal. Rptr. 304 (1977); Self v. General Motors Corp., 42 Cal. App. 3d 1, 116 Cal. Rptr. 575 (1974).

39. Wade, *On the Nature of Strict Tort Liability for Products*, 44 Miss. L.J. 825, 837 (1973).

40. Hoenig, *supra* note 28, at 137.

41. Keeton, *supra* note 22, at 39. In an earlier article, however, he suggested that the term "defect" be limited to miscarriages in the manufacturing process and that it not be extended to either design defects or "defects" attributable to false or inadequate information. Keeton, *Manufacturer's Liability: The Meaning of Defect in the Manufacture and Design of Products*, 20 SYRACUSE L. REV. 556, 562 (1969).

the two standards for design defects set forth by the court in *Barker*, it is necessary to discuss the tests for strict products liability espoused by Deans Keeton and Wade and to compare these tests with an action for negligence.[42]

Dean Keeton proposed the following test to identify a defect:

> A product is defective if it is unreasonably dangerous as marketed. It is unreasonably dangerous if a reasonable person would conclude that the magnitude of the scientifically perceivable danger *as it is proved to be at the time of trial* outweighed the benefits of the way the product was so designed and marketed. Under the heading of benefits one would include anything that gives utility of some kind to the product; one would also include the infeasibility and additional cost of making a safer product.[43]

Dean Wade's test to identify a defect in a product is similar:

> Assume that the defendant knew of the dangerous condition of the product and ask whether he was then negligent in putting it on the market or supplying it to someone else . . . . Once given this notice of the dangerous condition of the chattel, the question then becomes whether the defendant was negligent to people who might be harmed by that condition . . . . Another way of saying this is to ask whether the magnitude of the risk created by the dangerous condition of the product was outweighed by the social utility attained by putting it out in this fashion.[44]

Under both tests the defendant is assumed to know of the dangerous condition of the product. The question then becomes whether the defendant acted unreasonably in so marketing the product.[45] The issue is "whether the magnitude of the risk created by the dangerous condition of the product so outweighed the social utility attained by putting it out in this fashion that a reasonable seller would not have marketed it."[46]

The primary difference between the approach advocated by Deans Keeton and Wade, often called the risk/utility analysis, and common-law negligence is that under their approach, the plaintiff need not prove that the defendant knew or should have known of the dangerous condition of the product at the time of manufacture or sale.[47] As long as the product is shown to be defective when sold,[48] the plaintiff need not prove that the defendant knew or should have known of the defect.[49] Additionally, in

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42. *See also* Cepeda v. Cumberland Eng'r Co., 76 N.J. 152, 386 A.2d 816 (1978).

43. Keeton, *supra* note 22, at 37-38 (emphasis in original) (footnote omitted).

44. Wade, *supra* note 39, at 834-35 (footnotes omitted).

45. The defendant's conduct is theoretically not an issue under the risk/utility analysis of Deans Wade and Keeton because the balancing is done at the time of trial. As a practical matter, however, the jury seems likely to consider the defendant's conduct in design defect cases when assessing evidence of the infeasibility of making a safer product.

46. Note, *Reasonable Product Safety: Giving Content to the Defectiveness Standard in California Strict Products Liability Cases*, 10 U.S.F. L. REV. 492, 506 (1976) (footnotes omitted).

47. *See* Rheingold, *What Are Consumer's "Reasonable Expectations?"*, 22 BUS. LAW. 589 (1967).

48. Phillips, *The Standard for Determining Defectiveness in Products Liability*, 46 U. CIN. L. REV. 101, 102 (1977).

49. Wade, *supra* note 39, at 835.

strict products liability, the plaintiff need not show which of two or more defendants was responsible for the defect.[50] Furthermore, he need not prove that the defect could have been discovered, nor the specific act or omission that caused the defect.[51] Thus, the focus of analysis in strict products liability is on the condition of the product and not on the conduct of the defendant.

II. FACTS AND HOLDING OF *Barker v. Lull Engineering Co.*

Plaintiff, Ray Barker, sustained serious personal injuries operating a high-lift loader manufactured by defendant Lull Engineering Co.[52] The injuries occurred when Barker, who had operated the loader on only a few occasions, was attempting to lift a load of lumber onto the second story of a building. The ground on which the loader rested sloped sharply in several directions. Barker's coworkers saw the load beginning to tip and warned him to jump. While scrambling away from the loader, Barker was struck by a piece of falling lumber.[53]

Barker claimed that his injuries were caused by one or more design defects of the loader.[54] Defendant denied that the loader was defective and claimed that the injuries resulted from either Barker's lack of skill or his misuse of the loader.[55] Evidence introduced at trial on the alleged design defects sharply conflicted, and the jury returned a verdict in defendant's favor.[56]

Barker contended on appeal that the trial court erred in instructing the jury that "strict liability for the defect in design of a product is based on a finding that the product was unreasonably dangerous for its intended use . . . ."[57] He argued that this instruction directly conflicted with the decision of the court in *Cronin*, therefore mandating reversal of the

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50. In a strict products liability action, the plaintiff can sue not only the manufacturer, but also the wholesaler or distributor and the retail seller, among others. Barth v. B.F. Goodrich Tire Co., 265 Cal. App. 2d 228, 71 Cal. Rptr. 306 (1968); Vandermark v. Ford Motor Co., 61 Cal. 2d 256, 391 P.2d 169, 37 Cal. Rptr. 896 (1964); Greenman v. Yuba Power Prods., Inc., 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963).

51. *See* note 26 and accompanying text *supra*.

52. Barker v. Lull Eng'r Co., 20 Cal. 3d 413, 416-17, 573 P.2d 443, 445-46, 143 Cal. Rptr. 225, 227-28 (1978). The lessor of the loader was also joined as a party defendant. *Id.*

53. *Id.* at 419, 573 P.2d at 447, 143 Cal. Rptr. at 229.

54. Plaintiff alleged the following as defects in the design of the high-lift loader: (a) the lack of outriggers—mechanical arms—which would have stabilized the loader on uneven terrain; (b) the absence of a roll bar or seat belts which would have protected plaintiff if the loader rolled over; (c) the placement of the leveling mechanism of the loader in a position in which it was likely to be inadvertently bumped; (d) the absence of a "park" position on the transmission of the loader, which would have precluded the possibility of movement during the lift. *Id.* at 420-21, 573 P.2d at 447-48, 143 Cal. Rptr. at 229-30.

55. *Id.* at 420, 573 P.2d at 447, 143 Cal. Rptr. at 229. For a complete discussion of defense in strict products liability, see Noel, *Defective Products: Abnormal Use, Contributory Negligence and Assumption of Risk*, 25 VAND. L. REV. 93 (1972).

56. 20 Cal. 3d at 422, 573 P.2d at 449, 143 Cal. Rptr. at 231.

57. *Id.* at 422 n.4, 573 P.2d at 449 n.4, 143 Cal. Rptr. at 231 n.4.

judgment.[58] Defendants contended that the *Cronin* decision applied only to manufacturing defects and not to design defects, the issue in the instant case.[59]

The California Supreme Court in *Cronin* explicitly stated that its holding applied to both manufacturing and design defects.[60] Reaffirming this statement, the court in *Barker* concluded that the jury instruction was erroneous because it required the plaintiff to prove that the design made the product unreasonably dangerous, contrary to the holding in *Cronin*.[61] The court then articulated two standards under which the design of a product may be found defective.

First, the court held: "[A] product may be found defective in design if the plaintiff demonstrates that the product failed to perform as safely as an ordinary consumer would expect when used in an intended or reasonably foreseeable manner."[62] The court noted that this first standard is somewhat analogous to the warranty of fitness and merchantability under the Uniform Commercial Code.[63] Under this standard, which will be referred to as the consumer expectations standard, circumstantial evidence may be used to demonstrate the defectiveness of the product.[64]

The court also set forth a second standard for determining whether a product is defective in design. The court held:

> [A] product may be found defective in design, even if it satisfies ordinary consumer expectations, if through hindsight the jury determines that the product's design embodies "excessive preventable danger," or, in other words, if the jury finds that the risk of danger inherent in the challenged design outweighs the benefits of such design.[65]

This standard will be referred to as the risk-benefit standard. Once the plaintiff makes a prima facie showing that the injury was proximately caused by the design of the product, the burden of proof, not merely the burden of producing evidence, shifts to the defendant, who must prove, in light of relevant criteria, that the product was not defective.[66] Among the relevant criteria to be considered by the jury employing this standard, the court specifically mentioned

> the gravity of the danger posed by the challenged design, the likelihood that such danger would occur, the mechanical feasibility of a safer alternative

58. *Id.* at 422-23, 573 P.2d at 449, 143 Cal. Rptr. at 231.

59. *Id.* at 423, 573 P.2d at 449, 143 Cal. Rptr. at 231.

60. Cronin v. J.B.E. Olson Corp., 8 Cal. 3d 121, 134-35, 501 P.2d 1153, 1162-63, 104 Cal. Rptr. 433, 442-43 (1972).

61. Barker v. Lull Eng'r Co., 20 Cal. 3d 413, 426, 573 P.2d 443, 451, 143 Cal. Rptr. 225, 233 (1978). The court also found the instruction erroneous because it suggested that in evaluating defectiveness, only the "intended use" of the product was relevant, rather than its "reasonable foreseeable use." *Id.* at 426 n.9, 573 P.2d at 452 n.9, 143 Cal. Rptr. at 234 n.9.

62. *Id.* at 429, 573 P.2d at 454, 143 Cal. Rptr. at 236.

63. *Id.*

64. *Id.* at 430, 573 P.2d at 454, 143 Cal. Rptr. at 236.

65. *Id.*

66. *Id.* at 431-32, 573 P.2d at 455, 143 Cal. Rptr. at 237.

design, the financial cost of an improved design, and the adverse consequences to the product and to the consumer that would result from an alternative design.[67]

III. ANALYSIS OF *Barker*

The court in *Barker* established two standards for determining whether the design of a product that causes injury is defective. In order to grasp fully *Barker*'s importance, these standards will be separately examined in light of the tests and policies of past California strict products liability decisions. The application of these two standards will also be discussed before considering how courts might interpret *Barker* in future cases.

A. *The First Standard: Failure to Meet Consumer Expectations*

The enunciation of a consumer expectations standard in *Barker* raises the question whether this decision retreats from the *Greenman* court's arguable choice of a deviation from the norm test for product defects. The consumer expectations standard also poses the question whether *Barker* reintroduces the "unreasonably dangerous" requirement of the Restatement, rejected by *Cronin*, into strict products liability in California.

The court in *Barker* precluded the use of a deviation from the norm test in design defect cases by articulating two other standards for determining whether the design of a product is defective. This raises the possibility that *Barker* is inconsistent with *Greenman*, in which the court arguably employed a deviation from the norm test to find the product defective. This reading of *Greenman* is supported primarily by a dictum in *Jiminez v. Sears, Roebuck & Co.*[68] It is more likely, however, that the court in *Greenman* employed a consumer expectations standard and that *Barker* is consistent with *Greenman*.

The court in *Greenman* established the doctrine of strict products liability by stating that a manufacturer is subject to liability "when an article he places on the market . . . proves to have a defect that causes injury to a human being."[69] It is not clear whether *Greenman* dealt with a manufacturing defect or a design defect.[70] Furthermore, it is not readily

67. *Id.* at 431, 573 P.2d at 455, 143 Cal. Rptr. at 237.

68. 4 Cal. 3d 379, 482 P.2d 681, 93 Cal. Rptr. 769 (1971).

69. 59 Cal. 2d at 62, 377 P.2d at 900, 27 Cal. Rptr. at 700.

70. There is no language in the opinion clearly stating what type of defect was involved. First, the court did not differentiate between manufacturing and design defects in stating the *Greenman* rule, the holding of the case. Rather, the court omitted the use of the terms entirely, probably because it was more interested in allowing recovery by injured consumers than in delineating the scope of the nascent doctrine. Second, the court stated: "Plaintiff introduced substantial evidence that his injuries were caused by defective *design and construction* of the [lathe]." 59 Cal. 2d at 60, 377 P.2d at 899, 27 Cal. at 699 (emphasis added). This language by itself does not indicate what type of defect the plaintiff was able to prove. Summarizing the decision, the court stated: "To establish the manufacturer's liability it was sufficient that the plaintiff proved that he was injured . . . as a result of a defect in *design and manufacture* . . . that made the [lathe] unsafe . . . ." *Id.* at 64, 377 P.2d at 901, 27 Cal. Rptr. at 701 (emphasis added). Read literally, this language seems to indicate the product was defective in manufacture and defective in design, but, does not support a definite conclusion.

discernible whether the *Greenman* court employed a consumer expectations standard or a deviation from the norm test to determine that the product was defective. In an apparent reference to *Greenman*, the court in *Jiminez* stated: "[A] defective product is viewed as one which fails to match the quality of most like products, and the manufacturer is then liable for injuries resulting from deviations from the norm: the lathe did not like other lathes have a proper fastening device . . . ."[71] The court also noted that this test does not provide a solution for all cases.[72]

The problem that sometimes arises in applying the deviation from the norm test is choosing an appropriate norm against which to measure the allegedly defective product. In cases concerning manufacturing defects, the injury-causing product can be compared with the normal output of the manufacturer or the industry. In design defect cases, however, the entire product line of a manufacturer is allegedly defective, and selecting a control group can be more difficult.[73]

In *Barker* the court stated that a "deviation from the norm" test had not been used in past design defect decisions.[74] These decisions, according to *Barker*, employed two other standards—the consumer expectations standard and the risk-benefit standard.[75] By setting forth these two standards, the court in *Barker* implied that a deviation from the norm test is not applicable in design defect cases. The court also categorized *Greenman* as an example of the consumer expectations standard.[76] This is in direct contradiction to the dictum in *Jiminez* intimating that a deviation from the norm test was used in *Greenman*. There are three ways to resolve this potential conflict.

First, *Greenman* may have concerned a manufacturing defect. If this is true, the test or standard actually employed in *Greenman* was not important for the purposes of the court in *Barker*. The *Barker* decision did not state which test or standard is appropriate for *manufacturing* defects. The court merely precluded the use of a deviation from the norm test for *design* defects. *Barker* is not a retreat from *Greenman* if this interpretation is correct.

Second, *Greenman* may be viewed as a design defect case employing a consumer expectations standard. This is how the court in *Barker* classified *Greenman*.[77] Assuming this classification is correct, *Barker* and *Greenman* are consistent and the misleading dictum in *Jiminez* should be ignored.

Third, *Greenman* could be interpreted as a design defect decision in

71. Jiminez v. Sears, Roebuck & Co., 4 Cal. 3d 379, 383, 482 P.2d 681, 684, 93 Cal. Rptr. 769, 772 (1971).

72. *Id.*

73. Note, *supra* note 46, at 502.

74. Barker v. Lull Eng'r Co., 20 Cal. 3d 413, 429, 573 P.2d 443, 454, 143 Cal. Rptr. 225, 236 (1978).

75. *Id.*

76. *Id.* at 430, 573 P.2d at 454, 143 Cal. Rptr. at 236.

77. *See* text accompanying note 76 *supra.*

which a deviation from the norm test was employed. If this is true, the dictum in *Jiminez* is correct and the use of *Greenman* in *Barker* is erroneous. *Barker* then could be seen as a fallback from *Greenman* since *Barker* disapproved of a deviation from the norm test for design defects. This fear, however, is probably unfounded. Given the inherent difficulties of applying a deviation from the norm test to design defects,[78] the court in *Barker* chose instead a consumer expectations standard. The plaintiff's burden of proof under a consumer expectations standard is probably no greater than it is under a deviation from the norm test. Therefore, even if this interpretation of *Greenman* is correct, *Barker* is consistent with the notion underlying *Greenman* of keeping the plaintiff's burden of proof to a minimum.

Another important issue raised by *Barker* is whether the first standard reintroduces the "unreasonably dangerous" element that the court had tried to purge from strict products liability theory in *Cronin*. The court held in *Cronin* that the plaintiff need not prove that the product was unreasonably dangerous.[79] The Restatement definition of the term is: "[T]he article sold must be dangerous to an extent beyond that which would be contemplated by the ordinary consumer . . . ."[80] Both the Restatement definition of unreasonably dangerous and the first standard set forth in *Barker* are based on the expectations of the ordinary consumer. The consumer expectations test established by the Restatement, however, is more difficult for the plaintiff to meet than the first standard of *Barker*.[81] Under the Restatement definition of unreasonably dangerous, the plaintiff must at a minimum prove that the product was *more* dangerous than the ordinary consumer would expect. Under the first standard set forth in *Barker*, however, the plaintiff need only prove that the ordinary consumer would expect the product to be safer. One commentator has stated: "[T]here appears to be no significant difference between a standard based on proof of defect and one based on unreasonable danger, where both are defined in terms of the ordinary expectations of the average consumer."[82] To the extent that both *Barker* and the Restatement are based on ordinary consumer expectations, the first standard in *Barker* arguably reintroduces the element of unreasonable danger rejected by *Cronin*.

This argument, however, has no merit. The *Cronin* court's rejection of the consumer expectations test by which the Restatement defines the term unreasonably dangerous "was based . . . on a substantive determination that the Restatement's [consumer expectations test] represented an undue

78. *See* text accompanying note 73 *supra*.

79. *See* text accompanying notes 13-19 *supra*.

80. RESTATEMENT (SECOND) OF TORTS § 402A, Comment i (1965).

81. *See* Barker v. Lull Eng'r Co., 20 Cal. 3d 413, 425-26 n.7, 573 P.2d 443, 451 n.7, 143 Cal. Rptr. 225, 233 n.7 (1978).

82. Phillips, *supra* note 48, at 102 (footnotes omitted).

restriction on the application of strict liability principles."[83] The court in *Cronin* disapproved the consumer expectations test of the Restatement because the test was too difficult for the plaintiff to meet.[84] The court did not reject the use of a consumer expectations standard in all cases, but only when such a standard unduly burdens the plaintiff. The consumer expectations standard articulated in *Barker* does not excessively burden the plaintiff and is consistent with *Cronin*.

B. *The Second Standard: Risk Balanced With Benefits*

Arguably, the risk-benefit standard set out in *Barker* for determining whether the design of a product is defective, although employing a different linguistic formula, is essentially the risk/utility analysis advocated by Deans Keeton and Wade. Dean Keeton said that the balancing is done at the time of trial;[85] the *Barker* court said the test is one of hindsight.[86] Dean Wade asked whether the magnitude of the risk outweighed the social utility of the product;[87] in *Barker*, the question is whether the risk inherent in the challenged design outweighs the benefits of such design.[88] The relevant criteria that the court in *Barker* suggested for jury consideration are also quite similar to those suggested by Dean Wade.[89]

The most obvious difference between the Wade/Keeton approach and the risk-benefit standard adopted in *Barker* is the allocation of the burden of proof. Under the *Barker* approach, the *defendant* must prove that the benefits of the challenged design outweigh the inherent risk of

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83. Barker v. Lull Eng'r Co., 20 Cal. 3d 413, 425, 573 P.2d 443, 451, 143 Cal. Rptr. 225, 233 (1978).

84. *See* Cronin v. J.B.E. Olson Corp., 8 Cal. 3d 121, 132-33, 501 P.2d 1153, 1161-62, 104 Cal. Rptr. 433, 441-42 (1972); Barker v. Lull Eng'r Co., 20 Cal. 3d 413, 425-26, 573 P.2d 443, 451, 143 Cal. Rptr. 225, 233 (1978).

85. Keeton, *supra* note 22, at 38.

86. 20 Cal. 3d at 430, 573 P.2d at 454, 143 Cal. Rptr. at 236.

87. Wade, *supra* note 39, at 834.

88. 20 Cal. 3d at 430, 473 P.2d at 454, 143 Cal. Rptr. at 236.

89. *Compare* the criteria mentioned in text accompanying note 67 *supra* with the following suggested by Dean Wade:

> (1) The usefulness and desirability of the product—its utility to the user and to the public as a whole.
> (2) The safety aspects of the product—the likelihood that it will cause injury, and the probable seriousness of the injury.
> (3) The availability of a substitute product which would meet the same need and not be as unsafe.
> (4) The manufacturer's ability to eliminate the unsafe character of the product without impairing its usefulness or making it too expensive to maintain its utility.
> (5) The user's ability to avoid danger by the exercise of care in the use of the product.
> (6) The user's anticipated awareness of the dangers inherent in the product and their avoidability, because of general public knowledge of the obvious condition of the product, or of the existence of suitable warnings or instructions.
> (7) The feasibility, on the part of the manufacturer, of spreading the loss by setting the price of the product or carrying liability insurance.

Wade, *supra* note 39, at 837-38 (footnotes omitted).

danger. Under the approach of Deans Wade and Keeton, the *plaintiff* must prove that the risk created by the product outweighs its social utility.

Another seeming distinction between the Wade/Keeton approach and the risk-benefit standard set forth in *Barker* is the use or absence of the terms "reasonable" and "unreasonable." Under the risk/utility analysis advocated by Deans Wade and Keeton, the first question is whether the product is defective—that is, whether the risk outweighs the utility. If the product is found to be defective, the question then becomes whether the defendant acted unreasonably in marketing it. The primary emphasis, therefore, is on the condition of the product, and only secondarily does the trier of fact consider the conduct of the defendant.[90] Under the *Barker* approach, however, the jury determines only whether the risk of danger inherent in the challenged design outweighs the benefits of such design. No question of reasonableness arises.[91]

There are at least two possible reasons why the *Barker* court eschewed the use of the terms "reasonable" and "unreasonable" in the risk-benefit standard. First, in *Cronin* the court flatly rejected the use of the term "unreasonably dangerous" in strict products liability cases.[92] Second, had the court employed the term "reasonable," the focus of the jury might have been on the conduct of the defendant rather than on the condition of the product. This might make negligence a prerequisite to recovery.[93] The court indicated several times that "in a strict liability case, as contrasted with a negligent design action, the jury's focus is properly directed to the condition of the product itself, and not to the reasonableness of the manufacturer's conduct."[94]

Arguably, however, the term "reasonable" is implicit in the court's risk-benefit standard. If the jury finds that the risk of danger inherent in the challenged design outweighs the benefits of such design, is it not the same as finding that the product is in an unreasonable condition? If the two are the same, the inquiry could easily be put in terms of the defendant's conduct rather than as a characterization of the product: assuming the defendant had knowledge of the unreasonable condition of the product (the design defect), would he then have been acting unreasonably in placing it on the market?[95]

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90. Note, *supra* note 46, at 507.

91. The terms "reasonable" and "unreasonable" are used in this Case Comment in two different contexts. First, with respect to the product, if the trier of fact determines that the risks outweigh the benefits or social utility, the product, in the opinion of this writer, is in an "unreasonable condition." The term "reasonable" is also used when considering the conduct of the defendant. Reasonable conduct is that which society seeks to encourage, and unreasonable conduct is that which society seeks to discourage by subjecting the defendant to liability.

92. Cronin v. J.B.E. Olson Corp., 8 Cal. 3d 121, 501 P.2d 1153, 104 Cal. Rptr. 433 (1972); *see* text accompanying notes 13-19 *supra*.

93. Note, *supra* note 46, at 516-17.

94. Barker v. Lull Eng'r Co., 20 Cal. 3d 413, 434, 573 P.2d 443, 457, 143 Cal. Rptr. 225, 239 (1978); *see id.* at 418, 432, 573 P.2d at 447, 456, 143 Cal. Rptr. at 229, 238.

95. Welsh v. Outboard Motor Corp., 481 F.2d 252, 254 (5th Cir. 1973); Wade, *Strict Tort Liability of Manufacturers*, 19 Sw. L.J. 5, 15 (1965).

The court in *Barker* may have relied on a negligence discussion in an appellate decision as an example of a previous California strict products liability case employing a balancing approach. Of the three cases cited as authority by the court in *Barker* for the risk-benefit standard,[96] only in *Hyman v. Gordon* did the court clearly articulate a balancing test: "It was for the jury to balance the likelihood of harm and the gravity of harm as opposed to the burden of precaution which would effectively have avoided it."[97] In support of this proposition, the court in *Hyman* cited *Pike v. Frank G. Hough Co.*,[98] apparently relying on that court's discussion of *negligent* design, not of strict products liability.[99] The *Barker* court's reliance on *Hyman*, which in turn relied on *Pike*, is quite questionable.

On behalf of the plaintiff in *Barker*, amicus California Trial Lawyer Association (CTLA) contended that a standard directing the jury to weigh or balance a number of competing considerations is inconsistent with *Cronin* because it "rings of negligence."[100] The court gave three reasons for dismissing the CTLA's contention. First, the court said that by shifting the burden of proof to the defendant to show that the design is not defective, the risk-benefit standard lightens the plaintiff's burden of proof in conformity with *Greenman* and *Cronin*.[101] Second, the court felt that it is impossible to eliminate the weighing of a number of considerations in determining whether the design of a product is defective.[102] Third, in strict products liability, unlike negligence, the jury focuses on the condition of the product, not on the reasonableness of the defendant's conduct.[103]

It has been argued in this Case Comment that when the jury renders a verdict for the plaintiff because the risk inherent in the challenged design outweighs the benefits of such design,[104] the clear import of the verdict is that the product is in an unreasonable condition.[105] Any difference between the terms "unreasonable condition" and "unreasonably dangerous"— the term rejected by the *Cronin* court—is likely to be one of

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96. Buccery v. General Motors Corp., 60 Cal. App. 3d 533, 547, 132 Cal. Rptr. 605, 613-14 (1976); Self v. General Motors Corp., 42 Cal. App. 3d 1, 6, 116 Cal. Rptr. 575, 578 (1974); Hyman v. Gordon, 35 Cal. App. 3d 769, 773, 111 Cal. Rptr. 262, 264-65 (1973).

97. Hyman v. Gordon, 35 Cal. App. 3d 769, 775, 111 Cal. Rptr 262, 265 (1973).

98. 2 Cal. 3d 465, 470, 467 P.2d 229, 232, 85 Cal. Rptr. 629, 632 (1970). The court also cited Thompson v. Package Mach. Co., 22 Cal. App. 3d 188, 196, 99 Cal. Rptr. 281, 286 (1971), although it is not clear why.

99. Note, *supra* note 46, at 513.

100. Barker v. Lull Eng'r Co., 20 Cal. 2d 413, 433, 573 P.2d 443, 456, 143 Cal. Rptr. 225, 238 (1978) (quoting Cronin v. J.B.E. Olson Corp., 8 Cal. 3d 121, 133, 501 P.2d 1153, 1142, 104 Cal. Rptr. 433, 442 (1972)).

101. Barker v. Lull Eng'r Co., 20 Cal. 3d 413, 433, 573 P.2d 443, 456, 143 Cal. Rptr. 225, 238 (1978).

102. *Id.* at 433-34, 573 P.2d at 456-57, 143 Cal. Rptr. at 238-39.

103. *Id.* at 434, 573 P.2d at 457, 143 Cal. Rptr. at 239.

104. This argument assumes that the jury also finds that defective design proximately caused the plaintiff's injuries.

105. *See* text accompanying note 95 *supra*.

semantics and not of substance. The risk-benefit standard articulated in *Barker* may have brought back the unreasonably dangerous element that the *Cronin* decision tried to purge from the strict products liability action.

C. *Application of the Two Standards*

There are at least two possible ways to apply the standards articulated by the court in *Barker*. One approach is to view the two standards as independent, alternative tests for determining whether the design of a product is defective.[106] The other approach is to view the two standards as separate prongs of the same test for design defects.[107] Both of these approaches will be discussed and reasons set forth for preferring a single, two-pronged test to two alternative tests.

It may be argued that the court in *Barker* established two independent alternative tests to determine whether the design of a product is defective. This argument is supported by language in the opinion: "[A] product may be found defective in design . . . under either of two alternative tests."[108] The existence of two tests might also be inferred from the statement: "This dual standard . . . assures an injured plaintiff protection from products that either fall below ordinary consumer expectations . . . *or that*, on balance, are not as safely designed as they should be."[109]

If the court did establish two independent, alternative tests, a question that naturally arises is: who chooses the appropriate standard under which the case will be tried and then submitted to the jury? Under the first (consumer expectations) standard, the *plaintiff* has the burden of proving that the design is defective. Under the second (risk-benefit) standard, the *defendant* has the burden of proving that the design is not defective.

A case could conceivably arise in which the jury, having been instructed under both standards, finds that (1) the product fails to satisfy the ordinary consumer expectations of safety in its reasonably foreseeable use, and (2) the benefits of the challenged design outweigh the risk of danger inherent in such design. In other words, the plaintiff has met his burden of proof under the consumer expectations standard, and the defendant has met his under the risk-benefit standard. This problem, however, only arises if the two standards set forth in *Barker* are treated as two independent, alternative tests.

One way to resolve the dilemma presented by a conflict between the two tests is to refer to the overriding policy of past California strict products liability decisions—that is, risk allocation. If the plaintiff meets

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106. *See* text accompanying notes 108-09 *infra*.

107. *See* text accompanying notes 110-14 *infra*.

108. Barker v. Lull Eng'r Co., 20 Cal. 3d 413, 432, 573 P.2d 443, 455, 143 Cal. Rptr. 225, 237 (1978); *see id.* at 429, 573 P.2d at 454, 143 Cal. Rptr. at 236.

109. *Id.* at 418, 573 P.2d at 446-47, 143 Cal. Rptr. at 228-29 (emphasis added); *see id.* at 418, 426-27, 435, 573 P.2d at 446, 452, 457-58, 143 Cal. Rptr. at 228, 232, 239-40.

his burden of proof under the consumer expectations standard and the defendant meets his under the risk-benefit standard, the product has been found defective under one of the two tests. Since the primary policy of California decisions has been to allocate the cost of injury to the manufacturer or seller of a defective product, the plaintiff has proved the first element of an action if the product is found defective under *either* test, regardless of the jury's finding under the other test. Hence, when both parties have met their respective burden of proof, the defendant should still be subject to liability because the product is defective under the consumer expectations standard. The fact that the product has been found not to be defective under the risk-benefit standard should not affect the outcome in light of the policy of risk allocation.

Although one could argue that the court in *Barker* created the potential for a dilemma by establishing two independent alternative tests, a more logical application of the standards takes the form of a single test with two separate prongs.[110] This interpretation, which is supported by both the language of the *Barker* opinion and the policies underlying strict products liability in California, can be stated as follows:

(1) The plaintiff must prove that a product is defective in design because it fails to perform as safely as an ordinary consumer would expect when used in an intended or reasonably foreseeable manner.
  (a) If the plaintiff meets the burden of proof under this prong, the defendant is subject to liability if the design defect proximately caused injury.
  (b) If the plaintiff does not meet the burden of proof under this prong, only then is the second prong employed.
(2) Once the plaintiff makes a prima facie showing that the product proximately caused injury, the burden of proof shifts to the defendant to prove that its product is not defective in design because the benefits of the design outweigh the risk of danger inherent in the design.
  (a) If the plaintiff makes a prima facie showing that the design of the product proximately caused injury, the defendant is subject to liability if he fails to prove that the product is not defective in design as defined in this prong.
  (b) If the plaintiff fails to make a prima facie showing or if the defendant proves that the product is not defective in design as defined in this prong, the defendant prevails.

The only language in *Barker* that gives any support for two separate tests is the court's reference to "two alternative criteria" and "two alternative tests."[111] The court's use of "either" and "or" when articulating

110. Dean Twerski has suggested the following two-prong test for determining whether a product is defective:

> A products case would be submitted to the jury to determine first, whether the product met with average consumer expectations; if the answer is negative, defect is established. If the answer is in the affirmative then plaintiff bears the burden to establish, by utilizing relevant risk-utility criteria, that the product does not meet societal standards of safety.

Twerski, *supra* note 35, at 315-16 (footnotes omitted).

111. *See* note 108 and accompanying text *supra*.

the two standards gives definite support to neither position.[112] Language used throughout the rest of the opinion, however, gives substantial support to the proposition that the court intended to establish a single test for design defects with two separate prongs. For example, the court stated: "[T]he standard permits a manufacturer who has marketed a product *which satisfies ordinary consumer expectations* to demonstrate the relative complexity of design decisions and the trade-offs that are frequently required in the adoption of alternative designs."[113] The single-test interpretation of the two standards articulated in *Barker* is also given substantial support later in the opinion in a reference to the holding. The court stated: "Although past California decisions have not explicitly articulated the two-prong definition of design defect which we have elaborated above, other jurisdictions have adopted a somewhat similar . . . dual approach . . . ."[114]

The argument that the court intended to establish a single test with two separate prongs is also supported by the policies set forth in past California strict products liability decisions. The primary goal of these decisions was to ensure that the seller or manufacturer—not the injured consumer—would bear the cost of injury resulting from a defective product. In order to achieve this goal, the court in *Cronin* sought to confine the plaintiff's burden of proof in strict products liability to three elements: (1) defect; (2) proximate causation; and (3) injury. The *Barker* decision, read as establishing a single test for design defects, keeps the number of hurdles between the plaintiff and recovery to a minimum; if the plaintiff does not prevail under the first prong, he may still prevail under the second if the defendant fails to exculpate himself.

D. Barker *Applied in Future Decisions*

There are two issues relating to future application of the *Barker* standards. First, it is not clear whether cases of failure to warn will be treated as design defects or as a separate category. Second, *Daly v. General Motors Corp.*,[115] a California Supreme Court decision handed down after *Barker*, may influence how the lower courts apply the two standards for design defects.

The first issue is whether cases of failure to warn will be treated under

112. *See* note 109 and accompanying text *supra.*

113. *Id.* at 418, 573 P.2d at 447, 143 Cal. Rptr. at 229 (emphasis added).

114. *Id.* at 432, 573 P.3d at 456, 143 Cal. Rptr. at 238 (citations omitted) (emphasis added). This argument is also given substantial support by other language in the opinion. First, the court stated that "*at a minimum* a product must meet ordinary consumer expectations as to safety to avoid being found defective." *Id.* at 426 n.7, 573 P.2d at 451 n.7, 143 Cal. Rptr. 233 n.7 (emphasis in original). This statement implies that the other (risk-benefit) standard is part of a single test, rather than an independent test, for determining whether the design is defective. *See id.* at 430, 573 P.2d at 454, 143 Cal. Rptr. at 236. Second, throughout a paragraph discussing the rationale and limits of strict products liability, the court refers to "*the test* for defective design." *Id.* at 432, 573 P.2d at 456, 143 Cal. Rptr. at 238 (emphasis added).

115. 20 Cal. 3d 725, 575 P.2d 1162, 144 Cal. Rptr. 380 (1978).

the standards articulated in *Barker* for design defects. The court in *Barker* stated that in cases concerning manufacturing defects, the meaning of the term "defect" would require little or no elaboration.[116] The court then said: "[I]n other instances, as when a product is claimed to be defective because of an unsafe design or an inadequate warning the contours of the defect concept may not be self-evident."[117] In those cases, the trial judge may have to instruct the jury respecting the legal meaning of the term "defect."[118]

Later in the opinion, the court again suggested that three sorts of products may be found defective: products that deviate from the manufacturer's intended result; products that are unsafe because of a design defect; and products that are dangerous because they lack adequate warnings or instructions.[119] In drafting jury instructions defining the term "defect," trial and appellate courts should "consider prior authorities involving similar defective product claims."[120] After reaching this point in the decision, however, the *Barker* court totally ignored the cases of failure to warn.

The court stated: "[T]he concept of defect raises considerably more difficulties in the design defect context than it does in the manufacturing or production defect context."[121] This statement suggests that there are only two situations in which a product may be found defective for purposes of strict products liability. At least one commentator has argued that cases concerning inadequate warnings or instructions are merely a subclass of design defect cases since the products are in the condition intended by the manufacturer.[122] Whether this is the position of the California Supreme Court or whether cases of failure to warn constitute a category separate from design defects is not apparent from the *Barker* opinion.

The second issue is how the two standards will be applied in light of a major decision of the California Supreme Court handed down after *Barker*. This decision, *Daly v. General Motors Corp.*,[123] may be indicative of a shift in policy away from risk allocation to a greater concern for the potential liability of defendants in strict products liability actions. A thorough analysis of *Daly* is beyond the scope of this Case Comment. Read broadly, *Daly* holds that principles of comparative fault will be employed in strict products liability actions. This raises the possibility that contributory negligence will become a defense assertable in strict products liability actions to reduce the plaintiff's recovery. Prior to *Daly*,

116. Barker v. Lull Eng'r Co., 20 Cal. 3d 413, 417, 573 P.2d 443, 446, 143 Cal. Rptr. 225, 228 (1978).

117. *Id.* at 417-18, 573 P.2d at 446, 143 Cal. Rptr. at 228.

118. *Id.* at 418, 573 P.2d at 448, 143 Cal. Rptr. at 228.

119. *Id.* at 428, 573 P.2d at 453, 143 Cal. Rptr. at 235.

120. *Id.* at 429, 573 P.2d at 453, 143 Cal. Rptr. at 235.

121. *Id.* at 429, 573 P.2d at 453-54, 143 Cal. Rptr. at 235-36.

122. Twerski, *supra* note 35, at 303.

123. 20 Cal. 3d 725, 575 P.2d 1162, 144 Cal. Rptr. 380 (1978).

contributory negligence was not a defense in strict products liability actions.[124]

Daly does not deal directly with the standards for design defects articulated in *Barker*. *Daly* could nevertheless have an indirect effect on these standards *if* it is read broadly—which is likely—*and Barker* is read as establishing two alternative tests—which is unlikely.[125] The indirect effect would be limited to the case in which the plaintiff shows that the product failed to meet consumer expectations of safety and the defendant shows the benefits of the challenged design outweigh the inherent risk. In this limited situation, a court might conclude that, in light of the probable policy shift indicated by *Daly*, the defendant should not be subject to liability.

The narrow holding in *Daly* was that implied assumption of risk, to the extent that it is a form of contributory negligence, will be dealt with under principles of comparative fault. If the decision is read this narrowly, which seems unlikely, *Daly* is a continuation of the past pro-plaintiff strict products liability cases and does not indicate a shift away from the established California policy of risk allocation. Before *Daly*, unreasonable assumption of risk was an absolute bar to recovery; after *Daly*, such implied assumption of risk will merely reduce the plaintiff's recovery. Read in this manner, *Daly* would have no effect on the *Barker* decision should courts interpret *Barker* as establishing two separate tests for design defects.

IV. CONCLUSION

The court in *Barker* articulated two standards for determining whether the design of a product is defective. The consumer expectations standard is consistent with the court's decision in *Greenman* and *Cronin*. The risk-benefit standard is derived from the risk/utility analysis proposed by Deans Keeton and Wade; there is scant precedent in California strict products liability decisions for the approach. The second standard could be viewed as a retreat from *Cronin* because it injects a balancing approach into strict products liability theory.

Justice Francis was correct in asserting that courts must deal with the scope of the term "defect" as problems arise.[126] The California courts must now determine how to apply the two design defect standards established in *Barker*. They must also decide how to treat cases of failure to warn and the role of comparative fault in strict products liability litigation. The concept

124. Luque v. McLean, 8 Cal. 3d 136, 501 P.2d 1163, 104 Cal. Rptr. 443 (1972).

125. In reference to the *Barker* decision, Justice Jefferson, assigned by the Chairperson of the Judicial Council, specifically referred to the "two-prong test for determining the existence of a [design defect]." Daly v. General Motors Corp., 20 Cal. 3d 725, 754, 575 P.2d 1162, 1179, 144 Cal. Rptr. 380, 397 (1978) (Jefferson, J., concurring and dissenting). This comment makes it even more unlikely that *Barker* will be interpreted as establishing two separate tests.

126. Santor v. A and M Karagheusian, Inc., 44 N.J. 52, 67, 207 A.2d 305, 313 (1965); *see* text accompanying note 1.

of defect is indeed "a broad one."[127] Nevertheless, in *Barker v. Lull Engineering Co.* the California Supreme Court gave substance to that concept for a major portion of strict products liability cases—those in which the design of the product is allegedly defective.

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127. *Id.*